

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1221

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1221

UNITED STATES OF AMERICA,

Appellee,

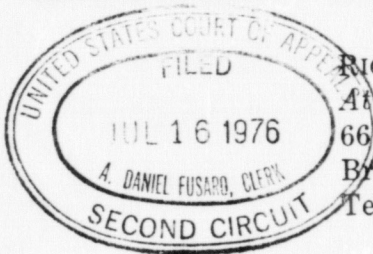
—v.—

LOUIS CARDENAS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLANT LOUIS CARDENAS



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Preliminary Statement

This is an appeal from a judgment of conviction entered on May 14, 1976, by the United States District Court for the Eastern District of New York, Thomas C. Platt, United States District Judge, sentencing the appellant to a term of three (3) years imprisonment to be followed by a 15 year term of special parole upon conviction by a jury of knowingly and intentionally conspiring to import into the United States from a place outside thereof and to distribute and possess with intent to distribute cocaine a scheduled two (2) narcotic drug controlled substance in violation of Title 21 U.S.C. Sections 841(A)(1); 952(a); 960(a)(1) (Title 21 U.S.C. Sections 846, 963).

Summary

The evidence adduced by the Government may be summarized as follows: Jeffrey Weber is employed as a forensic chemist with the Drug Enforcement Administration who testified that the substance seized was in fact cocaine (54-62).^{*} Edward Allen testified he was employed by United States Customs. On the morning of February 10, 1976 he was assigned to Pier 3 in Brooklyn. He stopped and searched a seaman later identified as Guerro Puello as the seaman tried to leave his ship the Columbian freighter *Cocamaranga*. A search of the seaman resulted in the seizure of three packets ultimately identified as cocaine (64-67). Dominick Ciani is in the plainclothes division of United States Customs, he assisted Mr. Allen in taking Guerro Puello into custody. As might be anticipated, after custody of the seaman was turned over to the Drug Enforcement Agency, Guerro Puello agreed to cooperate in an effort to secure the arrests of the individuals for whom the cocaine was intended in this country and to obtain leniency for himself. Juan Rodriguez is a Special Agent for the Drug Enforcement Administration. On February 10, 1976 along with Agents Francioso, Riddler and Pepertone he went to the Customs office where seaman Guerro was under arrest (84-85). He was given two pieces of paper by Customs Officer Ciani and Agent Riddler. Agent Rodriguez took custody of the kilogram of cocaine seized from seaman Guerro's person by Customs Officer Allen (85-86).

According to Agent Rodriguez the seaman agreed to cooperate. The Agents along with seaman Guerro thereupon proceeded to the area of Jay and Willoughby Streets in downtown Brooklyn where the seaman had informed the

^{*} Numerals refer to the page numbers of the transcript of the trial.

Agents he was to meet by prearrangement with a person carrying a yellow piece of paper. No one appeared. Guerro made several telephone calls at the urging of the Agent to a number written on a piece of paper which had been given to him by the person who gave him the cocaine in Columbia, South America. No one answered (87).

On the evening of February 10, 1976 seaman Guerro and the agents proceeded to 528 East 79th Street, New York City in search of a man named "Ayala". This address had been given to the seaman before his departure from South America as the man who would receive the cocaine. The seaman was equipped with a Kel-transmitter at this time (89-90). In total there were two conversations recorded. The Appellant Cardenas is involved only as to the second recording.

Following a recorded conversation with the seaman in the lobby of the building at 528 East 79th Street Appellant Cardenas, Defendants Munoz, Ganzalo and Jaramillo proceeded to a nearby automobile allegedly en route to Brooklyn to take possession of two (2) kilograms of cocaine brought to this country by the seaman Guerro.* As the seaman was purportedly handing a package of cocaine to Appellant Cardenas the arrest was effected by agents of the DEA who had been making observations in the area.

* The appellant sought by his cross-examination to show that the seaman was seeking a Mr. Ayala and/or a Mr. Cardona. The taped conversation indicated that the Appellants Cardenas and Munoz knew Ayala, but that Ayala was away at the time. The Government's position was that Cardona was really Cardenas. Furthermore, that the appellants acted with knowledge of the purpose of the transactions while the defendants' defense was that they were young men merely receiving an unidentified package for Ayala in order to curry favor with Ayala and had no knowledge of the package's contents. Jaramillo and Gonzalvo were acquitted —Munoz and Cardenas were convicted.

The seaman whose full name is Jorge Alberto Guerro Puello (referred to as "Guerro" in this brief) testified that he did not know any of the young men on trial personally and that he is a citizen of Columbia and has been a seaman for nine years in the capacity of "pharmacist." He testified that from 1972 to 1976 he had brought at least 20 kilograms of cocaine to this country (it has never been contended that the appellant or his co-defendants were involved with Guerro's prior criminal activities) [163-166]. Guerro prior to Appellant's trial had pleaded guilty to conspiracy to violate the narcotics laws. Guerro testified he left from Bueneventura, Columbia for New York on January 30, 1976 arriving on February 8, 1976. He had three kilograms of cocaine which had been delivered to him in Baranquilla, Columbia on January 17, 1976 from a man named Herberto Miranda Rodella which he brought aboard the ship and then to New York City (171-172).

[Direct Examination]

"Q. Would you explain step by step, Mr. Guerro, what your instructions were? A. The instructions that were given to me by Mr. Rodella, that I should arrive in Borough Hall, at the station or subway. I would wait and an individual would arrive with a yellow paper. That would be the individual with whom I would have to meet.

Q. Now, when were you supposed to go to Borough Hall? A. On the 10th of February. That is to say Tuesday.

Q. Now, you said this individual was supposed to have a yellow paper. What type of paper? A. Ordinary paper, yellow paper.

Q. What were you supposed to do? A. I would have the yellow—the blue coat. Once they saw me in a blue coat and I saw them with the yellow

paper, I would meet with them to figure out how we would arrange for the delivery of the cocaine which I brought.

Q. Now, what were your further instructions?

A. That if they didn't arrive, then I should make a phone call, if—if there was no answer at that phone, I should take a taxi and go to the addresses that were indicated on those pieces of paper and I should ask for the two people who were on them." (176-177)*

It had been established at the trial that this witness did not testify before the Grand Jury. Indeed, none of the witnesses who testified at trial had testified before the Grand Jury which voted to indict the Appellant Cardenas.

ARGUMENT

POINT I

The Trial Court abused its discretion as a matter of law by not dismissing the indictment herein when it appeared no direct testimony was adduced before the Grand Jury.

In *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966), Judge Waterman stated:

"[E]xcessive use of hearsay in the presentation of government cases to Grand Juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and

* The transcripts between Guerrero and Munoz begin at p. 192 and conclude at 199 of the record—between Cardenas and Guerrero at p. 206 and concludes at 210.

tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." 368 F.2d at 730

It is now clear that indictments based solely and unjustifiably upon hearsay will be dismissed without a showing of prejudice to the defendant. See *United States v. Arcuri*, 405 F.2d 691, 692-694 (2d Cir. 1968); *United States v. Catino*, 403 F.2d 491, 496, 497 (2d Cir. 1968); *United States v. Beltran*, 388 F.2d 449, 451-454 (2d Cir. 1968) (dissenting opinion of Medina, J.)

The Government cannot seriously contend that it would have been inconvenient to have the seaman Guerrero testify before the Grand Jury. It is neither unfair to conclude from this record that the decision not to have Guerrero testify before the Grand Jury was to totally inhibit the defense from having Guerrero's Grand Jury testimony for cross-examination purposes. Furthermore, inasmuch as Guerrero had given at least a half dozen versions of his role in the conspiracy to the Government (245-266) it seems evident that the Government feared Guerrero was incapable of telling the same story the same way on two separate occasions. This would not constitute good cause for not placing Guerrero before the Grand Jury. Unless it is to be assumed that a criminal trial is a contest—one side endeavoring to gain an advantage over the other—unfair or otherwise.

Guerrero testified upon cross-examination that until March 10, 1976, the very eve of the trial that the agents had told him they believed he was lying. Most significantly this was after the Government had obtained an indictment in this case.

[By Mr. Rosenkranz]

"Q. Is it correct to say that there were occasions until March 10th when the agents continued to tell you that they thought you were lying? A. No. Until the last time which was on the 10th yes.

Q. So, was it also true that back in February when you were first apprehended, that you lied to them twice on that day? A. Once, twice.

Q. You lied to them about why you were afraid to be searched, didn't you? A. Yes.

Q. You lied to them about how much cocaine you were bringing into the United States, didn't you? A. Yes.

Q. You lied to them at that time because you thought it was going to help you; didn't you. A. No.

Q. Did you lie because you thought your lying would hurt you? A. I lied because I did not want them to know that I had brought cocaine in at other times, fearing that that would increase my case and more since I am not familiar with the laws in this country. That is why I lied." (246-247)

The Government's purpose in not having their witness in chief testify before the Grand Jury is certainly clear. The question is one of fairness! If the Grand Jury is to be afforded the legal efficacy intended by the framers of our Constitution then grave procedural defects as evidenced in this case must be afforded their much deserved weight. Otherwise the Grand Jury process becomes a mockery. Appellate admonitions without concomitant effective sanctions in this area are meaningless.

In moving for Judgment of Acquittal the appellant Cardenas contended *inter alia*:

"Mr. Rosenkranz: The defendant Luis Cardenas specifically moves for a judgment of acquittal on the ground that the Government has failed to make out a prima facie case.

I would first readdress myself to an issue that we raised earlier concerning the fact that none of the witnesses have testified at this time apparently testified before the grand jury.

Since the decision in the Costello case, there have been numerous decisions primarily in this Circuit which I would like to give your Honor concerning this point.

The Court: I'm familiar with the cases in this Circuit on the grand jury testimony. You haven't established anything factual to show there was nothing before the grand jury.

Mr. Rosenkranz: I would renew my motion dismiss based on the—

Th Court: If you wanted to make such a motion you should have made it before trial. There is nothing to show me at trial that you believe I ought to inspect the grand jury minutes. I have heard the testimony.

Mr. Rosenkranz: My point is that we've been precluded from using the grand jury minutes for cross-examination by the fact that no witness who testified at the trial—

The Court: *That's perfectly possible. It could have happened that way given the facts in this case.*" (367-368).

With all due deference to the erudite Court below the availability of pre-trial motion for the inspection of Grand Jury proceedings while readily available in the State Courts simply does not exist in the Federal Courts. Perhaps the Court below had Fed. R. Crim. P. 6(e) in mind, but that Rule has no applicability whatsoever to the facts of the case at bar. The proposed motion to dismiss the indictment herein was made at the first instance that it appeared that none of the trial witnesses had testified before the Grand Jury. The trial Court's rulings in this regard were a clear abuse of discretion.

POINT II

The Court erred in its charge relative to accomplice's testimony. The charge as given was extremely prejudicial to the appellant.

As part of its "boilerplate" charge governing accomplice's testimony the Court emphasized without justification the Government's especial need for the use of accomplice's testimony particularly as in cases such as the one at bar:

"In certain types of cases the Government is out of necessity compelled to rely on testimony of accomplices or persons with criminal records or informers; otherwise it would be difficult to detect or prosecute some wrongdoers, *and this particularly is true in conspiracy cases*, and the government has no choice in the matter, it *must* take the witnesses to the transaction." (491).

The charge as given is unfairly favorable to the Government in that it implies the Court's overwhelming approval of the Government's approach in the prosecution of this case. The Court's treatment of the law concerning

the fact that such testimony should be viewed by the jury with extreme circumspection was so superficial and fleeting that counsel for Munoz had mistakenly believed that the Court had omitted such a caveat from its charge. In addition, the Court's position that the government is without choice and *must* use such testimony is totally inaccurate.

Further, the Court charged:

"This would still be so even though the accomplice was a confirmed criminal." (491).

It was Guerro's testimony that he had never been convicted of a crime "in my country" or anywhere else. When taking this testimony in conjunction with the Court's charge the jury is left with the distinct impression that Guerrero had provided a more "hybrid" form of accomplices' testimony since the Court stated, with unusual emphasis, that the testimony of even a "confirmed" criminal was good. *A fortiori* that of the alleged accomplice Guerrero who had no prior record was even better.

Simply stated this type of "boilerplate" instruction was prejudicial to the appellant Cardenas since it patently had no applicability to the facts of the instant case and was unduly favorable in enhancing the credibility of the Government's witness in chief. In a case as the one at bar where two defendants were acquitted and the proof not unduly convincing it cannot be gainsaid with certainty that this instruction did not tip the scale against the Appellant with the jury.

POINT III

Wherever applicable the appellant Cardenas joins in the points of appellant Munoz.

CONCLUSION

The judgment herein appealed from should be reversed and the indictment dismissed or a new trial ordered.

Respectfully submitted,

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